

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Larry J. Foster,

Debtor(s).

BKY 03-47913

Chapter 13 Case

**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF
CHAPTER 13 PLAN AND FOR CONVERSION OF CASE**

TO: All parties in interest pursuant to Local Rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), by and through her undersigned attorneys, moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on May 6, 2004, in Courtroom No. 7 West, United States Courthouse, 300 South 4th Street, Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on May 5, 2004 which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than May 3, 2004, which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on November 11, 2003. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may apply. Movant requests relief with respect to denial of confirmation of the debtor's proposed Chapter 13 plan dated October 21, 2003 (the "Plan") and for conversion of the case to a case under Chapter 7.

6. The debtor is the owner of certain real property located at 8432 Dupont Avenue North, Brooklyn Park, MN, legally described as : Lot 2, Block 1, Eichmiller Addition, according to the recorded plat thereof, and situate in Hennepin County,

Minnesota (the “Property”).

7. The debtor values the Property at \$150,500 on his Schedule A on file herein, and he states that it is subject to a first mortgage in favor of Midland Mortgage, in the sum of approximately \$73,105. He has claimed the equity in the Property exempt under Minn. Stat. §§ 510.01 and 510.02, in the amount of \$77,395.

8. On or about February 6, 2001, the debtor executed a Limited Power of Attorney (the “POA”) in favor of Linda Kay Green-Jones (“Linda”), a copy of which is attached hereto as an exhibit and incorporated by reference herein.

9. Among other things, the POA states: “Linda have [sic] the powers to pledge, sell, and dispose of any real or personal property without advance notice to me or approval by me.”

10. On or about June 14, 2002, Linda executed a promissory note and mortgage in favor of Conseco Finance Loan Company (“Conseco”), under her then-married name of Linda K. Foster, for the sum of \$66,200. The mortgage was secured by the Property and Linda signed the debtor’s name to the mortgage as “Larry J. Foster by Linda K. Foster, POA.” Copies of the promissory note and mortgage are attached hereto and incorporated by reference herein.

11. The Conseco mortgage was never filed of record against the Property.

12. The debtor revoked the POA by a writing dated December 18, 2002, a copy of which is attached hereto and incorporated by reference herein.

13. The debtor also executed a letter dated June 3, 2003, stating that the document revoking the POA was “drawn up in November of 2002,” however, the letter also acknowledges that “I did not mail the form to her until the end of December or early January.” A copy of this letter is also attached hereto and incorporated by reference herein.

14. The proposed Chapter 13 plan calls for payments of \$100 per month for 36 months, for a total of \$3,600. The plan funds, net of the Trustee’s fee (estimated at 10%), would be paid as follows: an estimated \$2,089 to the IRS for its priority tax claim (with the actual allowed priority claim to govern), and the balance of approximately \$1,184 to the debtor’s nonpriority unsecured creditors, whose claims total approximately \$73,174, a dividend of approximately 2%.¹

15. The Trustee has the power under 11 U.S.C. § 544 to avoid the unrecorded mortgage, and to preserve the avoided transfer for the benefit of the estate under 11 U.S.C. § 551.

¹ By far the largest creditor listed in the class of unsecured creditors is Litton Loan Servicing, which is the current holder of the Conseco note and mortgage, whose claim is estimated at \$72,190 in the debtor’s Schedule F and is listed as “disputed.”

16. The Trustee objects to confirmation of the Plan on the grounds that it does not meet the “best interests of creditors” test of 11 U.S.C. § 1325(a)(4), in that the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is less than the amount that would be paid on such claim if the estate of the debtor was liquidated under Chapter 7 of Title 11 on such date. The value of the nonexempt estate includes the value of voidable transfers, including the avoidable unrecorded mortgage in favor of Conseco.

17. The IRS has filed a proof of claim in which it asserts a priority claim against the debtor in the amount of \$7,445.52. The claim has neither been amended nor objected to and therefore it is deemed allowed.

18. The Trustee objects to confirmation of the Plan on the grounds that it does not provide for full payment of all claims entitled to priority, as required by 11 U.S.C. § 1322(a)(2).

19. Conversion of this case to a case under Chapter 7 of Title 11, United States Code, is in the best interests of creditors under 11 U.S.C. § 1307, so that a Chapter 7 trustee can be appointed to prosecute the avoidance action concerning the Conseco mortgage and preserve the avoided transfer for the benefit of the estate.

20. If necessary, the debtor, Linda K. Foster, and/or a representative of Conseco may be called to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests an order as follows:

1. Denying confirmation of the debtor’s Chapter 13 Plan dated October 21, 2003.
2. Converting this case to a case under Chapter 7 of Title 11, United States Code.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: April 22, 2004

/e/ Thomas E. Johnson
Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402-1521
(612) 338-7591

VERIFICATION

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, the

movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed: April 22, 2004

/e/ Thomas E. Johnson

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55
5m

①
784309

A240-10
R240-04

LIMITED POWER OF ATTORNEY

(With Durable Provision)

NOTICE: THIS IS AN IMPORTANT DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS. THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON WHOM YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO PLEDGE, SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. YOU MAY SPECIFY THAT THESE POWERS WILL EXIST EVEN AFTER YOU BECOME DISABLED, INCAPACITATED OR INCOMPETENT. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS FOR YOU. IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

TO ALL PERSONS, be it known, that I, Larry Joe Foster, of 8432 Dupont Ave. N. Brooklyn Park, MN Grantor, do hereby make and grant a limited and specific power of attorney to Linda Kay Green-Jones of 1997 Gold Trail Eagan, MN and appoint and constitute said individual as my attorney-in-fact.

My named attorney-in-fact shall have full power and authority to undertake, commit and perform only the following acts on my behalf to the same extent as if I had done so personally: all with full power of substitution and revocation in the presence: (Describe specific authority) Linda Kay Green-Jones is to act on my behalf in handling all my business affairs, which means communicating with Principal Residential Mortgage, all my medical doctors, attorneys, Social Security Administration, Ford Motor Company, utilities company, creditors, credit unions, banks, and Brooklyn Park Police Department.

The authority granted shall include such incidental acts as are reasonably required or necessary to carry out and perform the specific authorities and duties stated or contemplated herein.

My attorney-in-fact agrees to accept this appointment subject to its terms, and agrees to act and perform in said fiduciary capacity consistent with my best interests as my attorney-in-fact deems advisable, and I thereupon ratify all acts so carried out.

I agree to reimburse my attorney-in-fact all reasonable costs and expenses incurred in the fulfillment of the duties and responsibilities enumerated herein.

Special durable provisions:

This power of attorney shall not be affected by subsequent incapacity of the Grantor. This power of attorney may be revoked by the Grantor giving written notice of revocation to the attorney-in-fact, provided that any party relying in good faith upon this power of attorney shall be protected unless and until said party has either a) actual or constructive notice of revocation, or b) upon recording of said revocation in the public records where the Grantor resides.

Other terms: Linda have the powers to pledge, sell, and dispose of any real or personal property without advance notice to me or approval by me. These powers will exist even after I become disabled, incapacitated, incompetent, and in the event of my death. This Power of Attorney supersedes the previous Power of Attorney dated the year 2000, which authorized Ramona M. Olson to act as my attorney-in-fact. To all persons, be it known, my biological family does not have the right to revoke this Power of Attorney dated February 06, 2001.

Return

697927

MORTGAGE INFORMATION SERVICES, INC.
11059 W. MAPLE ROAD, SUITE D
OMAHA, NEBRASKA 68164

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Rev. 6/00

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ZZAA

Signed under seal this
Signed in the presence of:

6th day of February

(year) 2001

Witness

Witness

Witness

Witness

Grantor Larry J. Foster
Attorney-in-Fact Linda K. M. Jones

State of Minnesota,
County of Ramsey

On 2-6-2001 before me,
appeared Larry J. Foster

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

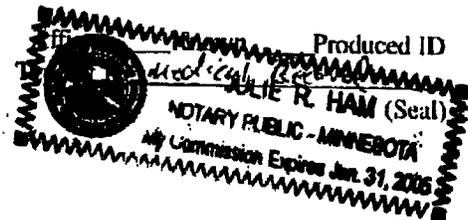
Signature

State of Minnesota
County of Hennepin
On 2/10/2001 before me,
appeared Linda Kay Green-Jones

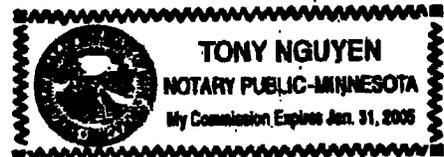
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature



Affiant Known Produced ID
Type of ID MN DL
(Seal)

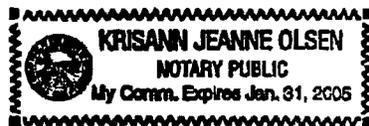


December 18, 2002

To whom it may concern:

I Larry J. Foster hereby on this date revoke any and all power or attorney rights given to my wife Linda K. Foster, formerly known as Linda K. Green, Jones.

This revocation of rights of power of attorney includes all matters of business, health, and real-estate transactions on my behalf.



Krisann Jeanne Olsen
12-18-02

Larry J. Foster
Larry J. Foster

June 03, 2003.

To whom it may concern,

This letter is to verify that I Larry J. Foster, had the document revoking my power of attorney privileges to my wife Linda K. Foster, drawn up in November of 2002. Because of hope that we could work our marital problems through, and undesiveeessness in the matter, I did not mail the form to her until the end of December or early January.



Debra E. Cole

6-3-03

Sincerely,

Larry J. Foster
Larry J. Foster

GT-15-24-011 (5/99)

Application # 0205290913

Linda Foster
 8432 Dupont Avenue North
 Brooklyn Park, MN 55445

BORROWER'S NAME AND ADDRESS
 "I," "me" and "my" means each
 borrower above, together and separately.

Conseco Finance Loan Company
 1550 East 79th St.
 Suite 650
 Bloomington, Minnesota 55425

LENDER'S NAME AND ADDRESS
 "You" and "your" means the lender,
 its successors and assigns.

Loan Number 6913912876
 Date June 14, 2002
 Maturity Date 06/19/2027
 Loan Amount \$ 66,200.00
 Renewal Of N/A

I promise to pay you, at your address listed above, the **PRINCIPAL** sum of Sixty Six Thousand Two Hundred and No/100 Dollars \$ 66,200.00

Single Advance: I will receive all of the loan amount on June 19, 2002. There will be no additional advances under this note.

Multiple Advance: The loan amount shown above is the maximum amount I can borrow under this note. On _____ I will receive \$ _____ and future principal advances are permitted.

Conditions: The conditions for future advances are _____

Open End Credit: You and I agree that I may borrow up to the maximum amount more than one time. All other conditions of this note apply to this feature. This feature expires on _____

Closed End Credit: You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from June 19, 2002 at the rate of _____

% per year until June 19, 2027 10.440

Variable Rate: This rate may then change as stated below.

Index Rate: The future rate will be _____ the following index rate: _____

No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

Frequency and Timing: The rate on this note may change as often as _____
 A change in the interest rate will take effect _____

Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ %
 or less than _____ %. The rate may not change more than _____ % each _____

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:
 The amount of each scheduled payment will change. The amount of the final payment will change.

ACCRUAL METHOD: You will calculate interest on a 30/360 day basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

on the same fixed or variable rate basis in effect before maturity (as indicated above).

at a rate equal to _____

LATE CHARGE: If I make a payment more than 10 days after it is due, I agree to pay a late charge of _____
5% of payment, or \$5.20, whichever is greater.

NSF FEE: If any instrument which I submit to you is returned unpaid for any reason, I will pay you a fee of \$30.00

ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which are _____ are not included in the principal amount above: See Addendum A

Authority: The interest rate and other charges for this loan are authorized by See Additional Terms Section on page 4

PAYMENTS: I agree to pay this note as follows:

Interest: I agree to pay accrued interest _____

EXHIBIT A

Principal: I agree to pay the principal _____

Installments: I agree to pay this note in 300 payments. The first payment will be \$ 622.21 and will be due July 19, 2002. A payment of \$ 622.21 will be due on the 19th day of each month thereafter. The final payment of the entire unpaid balance of principal and interest will be due June 19, 2027

SECURITY: This note is separately secured by (describe separate document by type and date):

Mortgage Deed dated June 14, 2002

(This section is for your internal use. Failure to list a separate security document does not mean the agreement will not secure this note.)

PURPOSE: The purpose of this loan is Refinance

DEFINITIONS: As used on pages 1 and 2 "X" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agree to pay this note (together referred to as "us"). "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW: The interest to be charged on this loan is governed by the laws of the state of See Additional Terms Section on page 4

All other terms of this transaction are governed by the laws of the state of Minnesota

If any provision of this agreement is unenforceable, the rest of the agreement remains in force. I may not change this agreement without your express written consent. Time is of the essence in this agreement.

I agree to cooperate with you regarding any requests after closing to correct errors made concerning this contract or the transaction and to provide any and all additional documentation deemed necessary by you to complete this transaction. I agree that you may enforce this agreement by judicial process and are entitled to attorney's fees, costs and disbursements incident to such enforcement.

PAYMENTS: You will apply each payment I make on this note first to any amount I owe you for charges which are neither interest nor principal. You will apply the rest of each payment to any unpaid interest, and then to the unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note.

PREPAYMENT: I may prepay this loan in whole or in part at any time. I will not pay a penalty upon prepayment unless otherwise stated in the next sentence. If I prepay in full within N/A months of the date of this note, I will pay you a penalty of N/A

Partial payments will not excuse or reduce any later scheduled payment until this note is paid in full.

INTEREST: Interest accrues on the principal remaining unpaid from time to time, until paid in full. If this is a Multiple Advance Loan, interest will accrue: N/A

The interest rate in effect on this note at any time will apply to all the money you advance at that time. Regardless of anything in this document that might imply otherwise, I will not pay and you will not charge a rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the credit you give me (before or after maturity).

If you send any erroneous notice of interest, we mutually agree to correct it. If you collect more interest

than the law and this agreement allow, you agree to refund it to me.

INDEX RATE: The index will serve only as a device for setting the rate on this note. You do not guarantee by selecting this index, or the margin, that the rate on this note will be the same rate you charge on any other loans or class of loans to me or other borrowers.

ACCRUAL METHOD: You will calculate the amount of interest I will pay on this loan using the interest rate and accrual method on page 1 of this note. When calculating interest, you will use the accrual method to determine the number of days in a "year." If you do not state an accrual method, you may use any reasonable accrual method to calculate interest.

POST MATURITY RATE: In deciding when the "Post Maturity Rate" (on page 1) applies, "maturity" means: 1.) The date of the last scheduled payment indicated on page 1 of this note, or; 2.) The date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS: If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph below.

MULTIPLE ADVANCE LOANS: If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed-end credit, I am not entitled to additional credit if I repay a part of the principal.

PAYMENTS BY LENDER: If you are authorized to pay, on my behalf, charges I am obligated to pay (such as property insurance premiums), then you may treat those payments made by you as advances and add them to the unpaid principal under this note. Or, you may demand immediate payment of the charges.

SET-OFF: You may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

If someone who has not agreed to pay this note also owns my right to receive money from you, your set-off right will apply to my interest in the obligation, and to any other amounts I could withdraw on my sole request or endorsement.

Your set-off right does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against one of my accounts. I will assume the liability and

relieve you of all responsibility for any such claim that occurs if you set off this debt against one of my accounts. **REAL ESTATE OR RESIDENCE SECURITY:** If I am giving you any real estate or a residence that is personal property as security for this note, I have signed a separate security agreement. Default and your remedies for default are determined by applicable law and by the security agreement. Default and your remedies may also be determined by the "Default" and "Remedies" paragraphs below, to the extent they are not prohibited by law or contrary to the security agreement.

DEFAULT: I will be in default if any of the following happen:

- (1) I fail to make a payment on time or in the amount due;
- (2) I fail to keep the property insured, if required;
- (3) I fail to pay, or keep any promise, on any debt or agreement I have with you;
- (4) Any other creditors of mine try to collect any debt I owe them through court proceedings;
- (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due);
- (6) I make any written statement or provide any financial information that is untrue or inaccurate when it was provided;
- (7) I do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you;
- (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority;
- (9) I change my name or assume an additional name without first notifying you;
- (10) I fail to plant, cultivate and harvest crops in due season;
- (11) Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land, or to the conversion of wetlands to produce an agricultural commodity, as explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

REMEDIES: If I am in default on this note, you have, but are not limited to, the following remedies:

- (1) You may demand immediate payment of everything I owe under this note;
- (2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph;
- (3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy;
- (4) You may refuse to make advances to me or allow me to make credit purchases;
- (5) You may use any remedy you have under state or federal law.

If you choose one of these remedies, you do not give up your right to use any other remedy later. By waiving your right to declare an event to be a default, you do not waive your right to later consider the event as a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES: I will pay all costs of collection, replevin (an action for the recovery of property wrongfully taken or detained), or any other or similar type of cost if I am in default.

In addition, if you hire an attorney to collect this note, I will pay attorney's fees plus court costs (except where prohibited by law). To the extent permitted by the United

States Bankruptcy Code, I will also pay the reasonable attorney's fees and costs you are charged to collect this debt as awarded by any court under the Bankruptcy Code's jurisdiction.

WAIVER: I give up my rights to require you to:

- (1) demand payment of amounts due (presentment);
- (2) obtain official certification of nonpayment (protest);
- (3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

ARBITRATION: All disputes, claims, or controversies arising from or relating to this note or the relationships which result from this note, or the validity of this arbitration clause or the entire note, shall be resolved by binding arbitration by one arbitrator selected by you with my consent. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, Title 9 of the United States Code. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes in court, but that they prefer to resolve their disputes through arbitration, except as provided herein. **THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY YOU (AS PROVIDED HEREIN).** The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this agreement. I agree that I shall not have the right to participate as a representative or a member of any class of claimants pertaining to any claim arising from or relating to this note. The parties agree and understand that the arbitrator shall have all powers provided by law and the note. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, you retain an option to use judicial or non-judicial relief to enforce a security agreement relating to the collateral secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation or to foreclose on the collateral. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the security agreement, shall not constitute a waiver of the right of any party to compel arbitration in this note, including the filing of a counterclaim in a suit brought by you pursuant to this provision.

OBLIGATIONS INDEPENDENT: I must pay this note even if someone else has also agreed to pay it (for example, signing this form or a separate guaranty or endorsement).

You may sue me alone, anyone else obligated on this note, or any number of us together, to collect this note. You may do so without any notice that it has not been paid (notice of dishonor).

You may, without notice, release any party to the agreement without releasing any other party.

If you give up any of your rights, with or without notice, it will not affect my duty to pay this note.

Any extension of new credit to any of us, or renewal of this note by all or less than all of us, will not release me from my duty to pay it. (Of course, you are entitled to only

L.K.F.

one payment in full.) You may extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice. You may do this without affecting my liability for payment of the note.

I will not assign my obligation under this agreement without your prior written approval.

CREDIT INFORMATION: I authorize you to obtain credit information about me from time to time (for example, by requesting a credit report) and to report to others your credit experience with me (such as a credit reporting agency). I will provide you, at your request, accurate, correct and complete financial statements or information you need.

NOTICE: Unless otherwise required by law, you will give any notice to me by delivering it or mailing it by first class mail to my last known address. My current address is on page 1. I will inform you in writing of any change in my address. I will give any notice to you by mailing it first class to your address stated on page 1 of this agreement, or to any other address you give me.

PURPOSE: The purpose of this loan is Refinance
ADDITIONAL TERMS:

Upon prepayment, any finance charges, as defined under state law, received will be refunded to the extent that the annual yield for the loan exceeds 21.75% APR.

This extension of credit is made under the authority of Minn. Stat. Sec. 53.04 and 47.59.

Upon payment in full of this loan, the lender may charge the actual costs the lender incurs or may incur for recording the release of the mortgage, deed of trust, or other security instrument securing this contract.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1, 2, 3, AND 4). I have received a copy on today's date.

Linda Foster 6/14/02
Signature Linda Foster Date

Signature Date

Signature Date

Signature Date

Signature for Lender

By: _____
Signature Date

Its: _____

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL INSTRUMENT

BY [Signature]

GT-15-24-090 (6/00)

Return To:

Conseco Finance
Attn: Trailing Documents Area
7360 South Kyrene Road
Tempe, AZ 85283

MORTGAGE
(With Future Advance Clause)

Application # 0205290913

Loan # 6913912876

1. **DATE AND PARTIES.** The date of this Mortgage (Security Instrument) is June 14, 2002 and the parties, their addresses and tax identification numbers, if required, are as follows:

MORTGAGOR: Linda Foster, Larry J Foster
a married couple

If checked, refer to the attached Addendum incorporated herein, for additional Mortgagors, their signatures and acknowledgments.

LENDER: Conseco Finance Loan Company
1550 East 79th St.
Suite 650
Bloomington, Minnesota 55425

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Mortgagor's performance under this Security Instrument, Mortgagor grants, bargains, sells, conveys and mortgages to Lender, with the power of sale, the following described property:

Parcel ID: 24-119-21-21-0058
See Exhibit A for full Legal Description.

The property is located in Hennepin at 8432 Dupont Avenue North Brooklyn Park, Minnesota 55444
(Address) (City) (ZIP Code)

EXHIBIT B

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** Notwithstanding anything to the contrary herein, enforcement of this Security Instrument is limited to a predetermined debt amount of \$ 66,200.00 under chapter 287 of Minnesota Statutes. This Security Instrument secures an indeterminate amount and the mortgage registration tax will be paid according to chapter 287 of Minnesota Statutes. Additional amounts secured by this Security Instrument include interest and any other amount advanced by Lender in protection of the Property or this Security Instrument including but not limited to taxes, assessments, charges, claims, fines, impositions, insurance premiums, amounts due under prior or superior mortgages and other prior or superior liens, encumbrances and interests, legal expenses and attorneys' fees.

4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:
A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. (You must specifically identify the debt(s) secured and you should include the final maturity date of such debt(s).)

Note dated June 14, 2002, between Conseco Finance Loan Company and Linda Foster, for \$66,200.00, maturing June 19, 2027.

B. All future advances from Lender to Mortgagor executed after this Security Instrument whether or not this Security Instrument is specifically referenced. If more than one person signs this Security Instrument, each Mortgagor agrees that this Security Instrument will secure all future advances that are given to or incurred by any one or more Mortgagor, or any one or more Mortgagor and others. All future advances are secured by this Security Instrument even though all or part may not yet be advanced. Nothing in this Security Instrument shall constitute a commitment to make additional future advances or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.

C. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

This Security Instrument will not secure any other debt if Lender fails to give any required notice of the right of rescission.

5. **PAYMENTS.** Mortgagor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.

6. **WARRANTY OF TITLE.** Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage, with the power of sale, the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.

7. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees:

- A. To make all payments when due and to perform or comply with all covenants.
- B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.
- C. Not to allow any modification or extension of, nor to request any future advances under, any note or agreement secured by the lien document without Lender's prior written consent.

8. **CLAIMS AGAINST TITLE.** Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.

9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Security Instrument is released.

10. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor shall not commit or allow any waste, impairment, or deterioration of the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims and actions against Mortgagor, and of any loss or damage to the Property.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Mortgagor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

- 11. AUTHORITY TO PERFORM.** If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Mortgagor appoints Lender as attorney-in-fact to sign Mortgagor's name or pay any amount necessary for performance. Lender's right to perform for Mortgagor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.
- 12. LEASEHOLDS; CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS.** Mortgagor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium or a planned unit development, Mortgagor will perform all of Mortgagor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.
- 13. DEFAULT.** Mortgagor will be in default if any of the following occur:
- Any party obligated on the Secured Debt fails to make payment when due.
 - A breach occurs under the terms of this Security Instrument or any other document executed for the purpose of creating, securing or guaranteeing the Secured Debt.
 - Any statement, representation or warranty made by Mortgagor or any co-maker, endorser, guarantor or surety to Lender at any time shall prove to have been incorrect or misleading in any material respect when made.
 - Mortgagor or any such co-maker, endorser, guarantor or surety shall die, liquidate, merge, consolidate, transfer a substantial part of its property, or if a partnership, limited liability partnership, or limited liability company, suffer the death, dissolution or liquidation of any partner or member.
 - A good faith belief by Lender that Lender at any time is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment or the value of the Property is impaired.
- 14. REMEDIES ON DEFAULT.** If this is a conventional loan under Minn. Stat. § 47.20, or as required under Minn. Stat. Chapter 53, Lender will give borrower written notice of default prior to foreclosure, "by certified mail at the address of the Property listed in this Security Instrument or such other address borrower may have designated to Lender in writing," unless the default consists of the sale of the Property without Lender's consent. The notice will specify: (a) the nature of the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is mailed by which the default must be cured; (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the mortgage and sale of the mortgaged premises; (e) that the borrower has the right to reinstate the mortgage after acceleration; and (f) that the borrower has the right to bring a court action to assert the nonexistence of a default or any other defense of the borrower to acceleration and sale. Additionally, in some other instances, federal and state law will require Lender to provide Mortgagor with notice of the right to cure or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Mortgagor is in default. Upon default, Lender shall have the right, without declaring the whole indebtedness due and payable, to foreclose against all or any part of the Property. This lien shall continue as a lien on any part of the Property not sold on foreclosure. At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the terms of the Secured Debt, this Security Instrument and any related documents, including without limitation, the power to sell the property. If there is a default, Lender may, in addition to any other permitted remedy, advertise and sell the property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Mortgagor at such time and place as Lender designates. If Lender invokes the power of sale, Lender shall give notice of the sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale. Lender or its designee may purchase the Property at any sale. Upon the sale of the Property and to the extent not prohibited by law, Lender shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser. Lender shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Mortgage; (c) any excess to the person or persons legally entitled to it. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein. If the Property is sold pursuant to this section, Mortgagor, or any person holding possession of the Property through Mortgagor, shall immediately surrender possession of the Property to the purchaser at the sale. If possession is not surrendered, Mortgagor or such person shall be a tenant holding over and may be dispossessed in accordance with applicable law. All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require complete cure of any existing default. By not exercising any remedy on Mortgagor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.
- 15. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Security Instrument. Mortgagor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest. These expenses will bear interest from the date of the payment until paid in full at the contract interest rate in effect from time to time as provided in the terms of the Secured Debt. Mortgagor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. This Security Instrument shall remain in effect until released. Mortgagor agrees to pay for any recordation costs of such release.

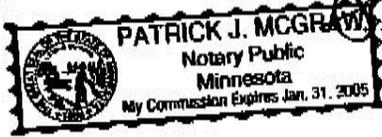
- 16. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), and all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.
- Mortgagor represents, warrants and agrees that:
- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
 - B. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are, and shall remain in full compliance with any applicable Environmental Law.
 - C. Mortgagor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor shall take all necessary remedial action in accordance with any Environmental Law.
 - D. Mortgagor shall immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any pending or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.
- 17. CONDEMNATION.** Mortgagor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.
- 18. INSURANCE.** Mortgagor shall keep Property insured against loss by fire, flood, hurricane, earthquake, tornado, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. If Mortgagor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.
- All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Mortgagor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Mortgagor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Mortgagor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Mortgagor.
- Unless otherwise agreed in writing, all insurance proceeds shall be applied to the restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of the scheduled payment nor change the amount of any payment. Any excess will be paid to the Mortgagor. If the Property is acquired by Lender, Mortgagor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.
- 19. ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.
- 20. FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Mortgagor will provide to Lender upon request any financial statement or information Lender may deem reasonably necessary. Mortgagor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Security Instrument and Lender's lien status on the Property.
- 21. JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Mortgagor signs this Security Instrument but does not sign an evidence of debt, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debt, and Mortgagor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Mortgagor, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Mortgagor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Mortgagor's consent. Such a change will not release Mortgagor from the terms of this Security Instrument. The duties and benefits of this Security Instrument shall bind and benefit the successors and assigns of Mortgagor and Lender.
- 22. APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Security Instrument is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.

- 23. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one mortgagor will be deemed to be notice to all mortgagors.
- 24. **WAIVERS.** Except to the extent prohibited by law, Mortgagor waives all appraisal, dower and homestead exemption rights relating to the Property.
- 25. **OTHER TERMS.** If checked, the following are applicable to this Security Instrument:
 - Construction Loan.** This Security Instrument secures an obligation incurred for the construction of an improvement on the Property.
 - Fixture Filing.** Mortgagor grants to Lender a security interest in all goods that Mortgagor owns now or in the future and that are or will become fixtures related to the Property. This Security Instrument suffices as a financing statement and any carbon, photographic or other reproduction may be filed of record for purposes of Article 9 of the Uniform Commercial Code.
 - Riders.** The covenants and agreements of each of the riders checked below are incorporated into and supplement and amend the terms of this Security Instrument. [Check all applicable boxes]
 - Condominium Rider Planned Unit Development Rider Other
 - Additional Terms.** Notwithstanding anything to the contrary herein, the maximum known principal indebtedness secured by this mortgage is \$66,200.00

SIGNATURES: By signing below, Mortgagor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Mortgagor also agrees that Lender has furnished Mortgagor with a conformed copy of the promissory note and mortgage on the date stated on page 1.

_____ 6/14/02 _____ Linda K. Foster POA
 (Signature) Linda Foster (Date) (Signature) Larry J Foster (Date) 6/14/02

ACKNOWLEDGMENT: STATE OF Minnesota, COUNTY OF Hennepin } ss.
 (Individual) This instrument was acknowledged before me this _____ day of June, 2002
 by Linda Foster, Larry J Foster
 My commission expires: _____



 (Notary Public)

This instrument was prepared by Patrick T O'Donnell, of Conseco Finance
Loan Company, 1550 East 79th St., Suite 650, Bloomington, MN 55425

EXHIBIT A

Legal Description:

Lot 2, Block 1, Eichmiller Addition, according to the recorded Plat thereof,
and situate in Hennepin County.

Torrens

Parcel ID: 24-119-21-21-0058

L.K.F.

L.J.F.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Larry J. Foster,

Debtor(s).

BKY 03-47913

Chapter 13 Case

**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION
AND MOTION TO CONVERT CASE**

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the debtor in his Schedules.

LEGAL DISCUSSION

Section 1325(a)(4) of the Bankruptcy Code states the so-called "best interests of creditors" test. Under this section, a proposed Chapter 13 plan can only be confirmed if:

the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. § 1325(a)(4).

The value of transfers which are avoidable must be included in the "best interests of creditors" analysis. *See, e.g., In re Larson*, 245 B.R. 609 (Bankr. D. Minn. 2000) (value of preferential transfers avoidable under 11 U.S.C. § 547 is to be included in valuing the non-exempt estate). Under 11 U.S.C. § 544(a), the trustee steps into the shoes of a hypothetical lien creditor, judgment creditor, or bona fide purchaser of property and can avoid an unrecorded pre-petition transfer of an interest of the debtor in real property. Under Minnesota law:

Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first

duly recorded, and as against any attachment levied thereon or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record prior to the recording of such conveyance.

Minn. Stat. § 507.34 (2002).

Therefore, in the present case, the trustee's status as a hypothetical judgment lien creditor enables the trustee to invoke the authority of § 544 of the Bankruptcy Code to avoid the unrecorded mortgage in favor of Conseco and to preserve the transfer of the debtor's interest in the Property for the benefit of the bankruptcy estate.

The fact that the debtor's interest in the Property was transferred by an attorney in fact pursuant to a limited power of attorney does not change the outcome. The power of attorney clearly authorized the debtor's attorney in fact to "**pledge, sell, and dispose of** any real or personal property **without advance notice to me or approval by me.**" *Limited Power of Attorney dated February 6, 2001.* Under Minnesota law:

A person who is a competent adult may, as principal, designate another person or an authorized corporation as the person's attorney-in-fact by a written power of attorney. The power of attorney is validly executed when it is dated and signed by the principal and, in the case of a signature on behalf of the principal, by another, or by a mark, acknowledged by a notary public.

Minn. Stat. § 523.01 (2002).

Based on the above statute, the Trustee contends that the Limited Power of Attorney dated February 6, 2001 was validly and properly executed under Minnesota law. In effect, the debtor's attorney in fact "stepped into the shoes" of the debtor by the terms of the power of attorney, and was vested with full authority to enter into the transaction in question. Furthermore, under Minnesota law, "[a]n executed power of attorney may be revoked only by a written instrument of revocation signed by the principal" and it "is not effective as to any party unless that party has actual notice of the revocation." *Minn. Stat. § 523.11, subd. 1, 2 (2002).* Since the power of attorney was not revoked until the December 18, 2002 notice of revocation was executed, it was still valid and subsisting at the time the Conseco mortgage transaction was entered into in June of 2002. In short, the Conseco mortgage was a valid and permissible exercise of the attorney in fact's authority to act on behalf of the debtor under the limited power of attorney.

Nor can the debtor exempt the property transferred once it is avoided and recovered by the trustee. Under 11 U.S.C. § 522(i)(2), the debtor has a limited right to "preserve for the benefit of the debtor" an avoided transfer, but only "to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection." Paragraph (1) of 11 U.S.C. § 522(i) only applies to transfers avoided by the debtor and hence is inapplicable to this situation. Subsection (g) allows a debtor to

exempt recovered property if “such transfer was not a voluntary transfer of such property by the debtor; and [] the debtor did not conceal such property.” The Trustee contends that by vesting his attorney in fact with full authority to “pledge, sell, and dispose of any real or personal property without advance notice to me or approval by me,” the debtor must be deemed to have voluntarily entered into the mortgage transaction, through his attorney in fact. Since the transaction was voluntary, the debtor cannot exempt the interest in the property that the trustee will recover.

Moreover, the fact that the Conseco mortgage involved the debtor’s exempt homestead will not prevent the trustee from avoiding the unrecorded mortgage and preserving the transfer for the benefit of the estate. In a similar situation, the bankruptcy appellate panel for the Eighth Circuit has upheld the right of a chapter 7 trustee to avoid various mortgages granted by the debtors as to their homestead, as preferential transfers, and to recover the equity for the benefit of the bankruptcy estate. *In re Arzt*, 252 B.R. 138 (8th Cir. BAP 2000). Although the transferees argued that pre-petition transfers of exempt property were somehow immune from avoidance and recovery by a trustee, the bankruptcy appellate panel held to the contrary, stating:

It may be true that creditors cannot reach a debtor’s exempt interest in property, but it is also true that debtors are free to voluntarily encumber that interest. That is what happened in this case, and since that voluntary transfer was preferential, the Trustee’s recovery of the transfer is for the benefit of the estate, not the debtors.
*252 B.R. at 142.*²

The debtor has proposed a minimum term plan that will result in slightly more than a 1% dividend to his unsecured creditors, whose claims total in excess of \$73,000. Since the value of the avoidable unrecorded mortgage greatly exceeds this amount, the plan fails to meet the “best interests of creditors” test of 11 U.S.C. § 1325(a)(4) and confirmation must be denied.

As an additional ground for denial of confirmation, the Trustee notes that, although the Plan provides that all allowed priority claims will be paid in full, the Plan greatly underestimates the priority claim of the IRS, to the extent that the Plan is significantly under-funded. The IRS priority claim of \$7,445.52 is “deemed allowed” as filed, under 11 U.S.C. § 502(a), in the absence of any objection. Because the Plan only provides for total payments of \$3,600, clearly the Plan is insufficiently funded to pay all priority claims in full, as required by 11 U.S.C. § 1322(a)(2). Therefore, confirmation must be denied on this ground as well.

² See also, *In re Wegner*, 210 B.R. 799 (Bankr. D. N.D. 1997), cited with approval in *Arzt*. In *Wegner*, on facts very similar to those of the present case, Judge Hill held that the Chapter 7 trustee could avoid an unrecorded mortgage against the debtors’ homestead under § 544 and that upon avoidance and recovery under § 551 the trustee succeeded to the mortgagee’s interest in the debtor’s homestead, stating “Exemption statutes cannot be invoked to defeat a section 551 recovery of an avoided transfer.” *210 B.R. at 802*.

The Court has the power to dismiss or convert the debtor's case for "cause," whichever is in the best interests of creditors and the estate, and a nonexclusive list of grounds is included in the statute, 11 U.S.C. § 1307(c). The Trustee argues that conversion to Chapter 7 is in the best interests of creditors, so that a liquidating trustee can be appointed to commence the necessary avoidance action and recover the value of the unrecorded Conseco mortgage for the benefit of all creditors.³

CONCLUSION

For the reasons stated herein, the Trustee respectfully requests that confirmation of the debtor's proposed Chapter 13 plan be denied, and that this case be converted to a case under Chapter 7 of Title 11, United States Code.

Respectfully submitted:

Dated: April 22, 2004

/e/ Thomas E. Johnson
Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402-1521
(612) 338-7591

³ The Trustee notes that the debtor has received a prior Chapter 7 discharge in a case filed within six years of the present case (BKY 02-40533, filed on February 7, 2002), and therefore the debtor would be ineligible to receive a discharge in the converted case, according to 11 U.S.C. § 727(a)(8). Nevertheless, in view of the substantial potential recovery available for the debtor's creditors, conversion to Chapter 7 is still the appropriate remedy.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Larry J. Foster,

Debtor(s).

BKY 03-47913

Chapter 13 Case

UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on April 22, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan, Memorandum of Facts and Law, and proposed Order Denying Confirmation of Chapter 13 Plan and Converting Case on the individual(s) listed below, in the manner described:

By e-mail:

United States Trustee
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

By first class U.S. mail, postage prepaid:

Larry J. Foster
8432 Dupont Ave. N.
Brooklyn Park, MN 55444

Randall Smith, Esq.
UAW-Ford Legal Services Plan
2233 University Ave., Suite 235
St. Paul, MN 55114

Shapiro & Nordmeyer, LLP
7300 Metro Blvd., Suite 390
Edina, MN 55439-2306

James A. Geske
Wilford & Geske
7650 Currell Blvd., Suite 300
Woodbury, MN 55125

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: April 22, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Larry J. Foster,

Debtor(s).

BKY 03-47913

Chapter 13 Case

**ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN AND
CONVERTING CASE**

At Minneapolis, MN, _____, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to confirmation of the debtor's proposed modified Chapter 13 plan and motion to convert the case.

Appearances were noted in the minutes.

Upon the foregoing objection, arguments of counsel, and all of the files, records and proceedings herein:

IT IS ORDERED:

1. Confirmation of the debtor's Chapter 13 plan is DENIED.
2. This case is CONVERTED TO A CASE UNDER CHAPTER 7.

Nancy C. Dreher
United States Bankruptcy Judge